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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO*

Public Document

Application of
The Association of Defence Counsel Practicing Before the
International Criminal Tribunal for the Former Yugoslavia
To File an *Amicus Curiae* Brief on
The Motion on the inadmissibility of material obtained in violation of the
statutory guarantee that accused and counsel be able to communicate freely and in
confidence

Source: Association of Defence Counsel Practicing Before the International
Criminal Tribunal for the Former Yugoslavia (ADC-ICTY)

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC), the Trial Chamber is hereby requested to grant leave to the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) to file an *amicus curiae* brief in the case of *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*.¹
2. The *amicus* brief will address the exceptional circumstances raised in the “Motion on the admissibility of material obtained in violation of the statutory guarantee that accused and counsel be able to communicate freely and in confidence”, filed by the defence for Mr. Kilolo on 10 August 2015.²
3. The ADC-ICTY, as an organization of defence counsel with significant expertise in representing accused in criminal trials before international tribunals, is concerned with the resolution of the issues raised in the *Kilolo motion*, including (1) the manner in which the attorney-client privilege has been defined in the case; (2) the exclusion of defence team members, such as case managers, legal consultants and legal assistants and the information they receive and work with, from the attorney-client privilege who are not recognized under Regulations 124-127 of the Regulations of the Registry; (3) the exclusion of defence team members, such as case managers, legal consultants and legal assistants and the information they receive and work with, from the attorney-client privilege who do not meet the requirements of Regulations 124-127 of the Regulations of the Registry; (4) the apparent lack of any uniform and controlled protocol, judicial or otherwise, including standards for oversight and minimization, for the interception of attorney-client communications and review of attorney-client written communications or attorney work product; (5) the lack of an ICC regime for the appointment of a special master to protect those privileges that exist between defence counsel and the client, or other privileged material that may be in the possession of the defence; (6) the lack of an ICC regime for the appointment of an independent prosecutor in cases involving criminal allegations against defence counsel or defence team members; (7) the lack of notice in the Statute as to all potential exceptions to the attorney-client privilege; (8) the

¹ Case No. ICC-01/05-01/13 [hereinafter cited as “*Kilolo case*”].

² *Kilolo case*, Motion on the admissibility of material obtained in violation of the statutory guarantee that accused and counsel be able to communicate freely and in confidence,” ICC-01/05-01/13-1140, 10 August 2015 [hereinafter cited as “*Kilolo motion*”].

propriety of the waiver of defence counsel privileges and immunities by the President of the ICC; (9) the propriety of the waiver of defence counsel privileges and immunities by the President of the ICC given that defence counsel function as independent contractors at the ICC and the defence is not an organ of the ICC; and 10) the propriety of the waiver of defence counsel privileges and immunities by the President of the ICC in order to assist an investigation of counsel.

II. THE ADC-ICTY

4. The ADC-ICTY is an association of defence counsel practicing before the International Criminal Tribunal for the Former Yugoslavia (ICTY). It is recognized as the defence counsel organization serving the ICTY pursuant to Rule 44(A) (iii) of the Rules of Procedure and Evidence for the ICTY.³ It is the only association of defence counsel, which has been officially recognized by an international court.
5. In its preamble, the ADC-ICTY Constitution states that it “is a partner, along with the organs of the International Tribunal, in promoting the fairness of the proceedings and the accomplishment of the mission of the International Tribunal pursuant to United Nations Security Council Resolution 827 (1993)”.⁴
6. On 24 August 2015 the mandate of the ADC-ICTY was expanded when it was also recognized by the Registrar of the Mechanism for International Criminal Tribunals (MICT), as adopted by Security Council Resolution 1966 of 2011, as an association of counsel practicing at the MICT, pursuant to Rule 42(A) (iii) of the Rules of Procedure and Evidence of the MICT.⁵
7. The ADC-ICTY now represents counsel appearing, as part of MICT, before the ICTY as well as the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania.

³ ICTY Rules of Procedure and Evidence (RPE), IT/32/Rev.50, 8 July 2015, Rule 44(A). The rule lists the minimum qualifications for counsel to practice before the ICTY. Rule 44(A) requires that counsel practicing before the ICTY must be “a member in good standing of an association of counsel practicing at the Tribunal recognized by the Registrar.” The ADC-ICTY was established in 2002 as an independent, non-profit, professional association to fulfill this requirement. In practice no counsel may represent an accused at the ICTY unless counsel is a member in good standing of the ADC-ICTY at the time of that representation.

⁴ The Constitution of the ADC-ICTY is on file with the Office of the Registrar of the ICTY. It may also be found at: <http://adc-icty.org/adcdocuments.html>.

⁵ MICT Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rule 42(A).

8. A total of 147 trials and appeals have been completed to date at the ICTY, of the 161 indictments brought before that Tribunal since its inception. Trial proceedings are currently ongoing in four cases. Appeals are currently pending in ten cases.⁶
9. Members of the ADC-ICTY have served as defence counsel in all of these cases both as retained counsel and, in the majority of cases, as counsel assigned to the accused by the Registry.
10. In 2011 the ADC-ICTY produced, with the assistance of the European Union and under the auspices of the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the OSCE Office of Democratic Institutions and Human Rights (OSCE-ODIHR) War Crimes Justice Project, its “*Manual on International Criminal Defence—ADC-ICTY Developed Practices*”.
11. The Manual recognizes, in its introduction, that the ADC-ICTY has developed a “unique expertise” arising from representation of the accused in war crimes, crimes against humanity and genocide cases at the ICTY, including the development of a body of written work, practical experience and courtroom skills which translate to both domestic war crimes courts and other international courts.⁷
12. In particular, as relates to this case, the ADC-ICTY has well over a decade of experience in creating defence teams, including lead counsel, co-counsel, case managers, legal assistants, investigators, experts and interns. All members of the ADC-ICTY are required to be familiar with and to abide by the Code of Professional Conduct for Counsel Appearing Before the ICTY,⁸ which defines the legal and ethical obligations of counsel charged with defending an accused.
13. The ADC-ICTY itself maintains a Disciplinary Council within the organization to provide ethical advice and advisory opinions on issues related to the conduct of counsel.⁹ Members of the ADC-ICTY also serve as members of the Disciplinary Board of the ICTY and Disciplinary Panel of the ICTY, responsible for reviewing the conduct of

⁶ These statistics can be found at: <http://www.icty.org/sections/TheCases/KeyFigures>.

⁷ *Manual on International Criminal Defence: ADC-ICTY Developed Practices* (UNICRI, ADC-ICTY, ODIHR, OSCE 2011), Introduction, pg. 3, available at: <http://wcjp.unicri.it/deliverables/manual.php>.

⁸ Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 Rev.3, as amended 22 July 2009, available at: <http://www.icty.org/sections/LegalLibrary/Defence>.

⁹ See Part V of the Constitution of the ADC-ICTY, 23 October 2004, which explains the specific mandate and responsibilities of the Disciplinary Council, available at: http://adc-icty.org/Documents/adciety_constitution.pdf.

defence counsel and, when required, imposing appropriate disciplinary or other sanctions pursuant to the Code of Conduct.

14. The ADC-ICTY has also previously appeared as *amicus curiae* in international criminal cases including, for example, *Prosecutor v Brdjanin* (on substantive law questions regarding joint criminal enterprise),¹⁰ *Prosecutor v Prlić et al.* (regarding whether conduct of counsel constituted contempt of court, violation of the Rules of Procedure and Evidence or other misconduct),¹¹ *Prosecutor v Hadžihasanović* (regarding the impact of the allocation of resources to the accused on his right to a fair trial),¹² and most recently in *Prosecutor v Kamuhanda* (on the appropriate modalities for defence counsel to interview protected witnesses in post-conviction review proceedings).¹³

15. The ADC-ICTY views, as part of its mission, the obligation to ensure that the rights of the accused and the fairness of proceedings in the international courts are guaranteed to the accused in accordance with the applicable Statutes, Rules of Procedure and Evidence and other relevant international covenants and instruments. A fundamental right of the accused, in all the international courts including the ICC, is the right to counsel, which includes the corresponding right to maintain the confidentiality of the attorney-client communications, with very limited exceptions.

16. The ADC-ICTY respectfully submits that the expertise it has gathered as an organization and through its individual members in all phases of the pre-trial, trial and appellate proceedings, includes significant experience and insight into the importance of the issues it wishes to address in this case, including the confidentiality of the attorney-client relationship as essential in facilitating and maintaining the fairness of the proceedings as well as the independence of defence counsel and the defence function.

III. RELIEF REQUESTED

17. The ADC-ICTY respectfully requests that the Trial Chamber grant it leave to file *amicus curiae* brief concerning the *Kilolo motion* in this case given potential wide-ranging and

¹⁰ *Prosecutor v Brdjanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel—ICTY, 6 July 2005.

¹¹ *Prosecutor v Prlić et al.*, IT-04-74-T, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ICTY, 13 August 2009.

¹² *Prosecutor v Hadžihasanović*, IT-01-47-PT, Amicus Brief of the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia in Support of Joint Defence Oral Motion for Reconsideration of Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 14 July 2003.

¹³ *Prosecutor v Kamuhanda*, MICT-13-33, ADC-ICTY *Amicus Curiae* Observations, 10 September 2015.

significant impact resolution of that motion will have on the future potential intrusions into the confidentiality of the attorney-client relationship.

18. The filing of the requested *amicus* brief will not result in any undue delay of proceedings as the brief can be filed before the start of the trial proceedings currently scheduled to begin on 29 September 2015. The requested *amicus* brief will not prejudice any party to these proceedings as Rule 103(2) provides that the parties have the right to respond to any *amicus* brief if leave to file is granted. Given the importance of the interests at stake to the developing international criminal law system the ADC-ICTY submits that full and fair airing of those issues, which includes observations made by an experienced defence organization such as the ADC-ICTY, will significantly contribute to the fair and expeditious resolution of those issues.

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RESPECTFULLY SUBMITTED,



COLLEEN M. ROHAN

President

Association of Defence Counsel Practicing Before the International Criminal Tribunal
for the Former Yugoslavia - And Representing Counsel Before the MICT

Dated this 16th Day of September 2015

At The Hague, Netherlands